United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7675

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

THOMAS W. EGGERT,

Plaintiff-Appellant,

v.

NORFOLK & WESTERN RAILWAY COMPANY and ERIE LACKAWANNA RAILWAY COMPANY,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

[redacted]

[redacted]

Attorneys for Defendants-Appellees,

[redacted]

[redacted]

[redacted]

Of Counsel.

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BRIEF FOR DEFENDANTS-AP LEES

Nature of the Case

This appeal arises from the entry of a judgment on a decision in the United States District Court for the Western District of New York in the case of Thomas W. Eggert v. The Norfolk and Western Railway Company and the Erie Lackawanna Railway Company, Civil 1973-370. The plaintiff is appealing from an order entered on the decision of the Honorable John T. Elfvin which granted the defendant's motion for a directed verdict at the close of plaintiff's case.

Plaintiff brought a claim seeking damages allegedly resulting from the defendant's violation of the Federal

Employer's Liability Act. Judge Elfvin dismissed plaintiff's cause of action on the ground that plaintiff's evidence failed to show any negligence on the part of defendant which caused plaintiff's alleged injuries.

Statement of Facts

The plaintiff-appellant was an engineer on the Erie Lackawanna Railway and was allegedly injured while working in the cab of a Norfolk and Western Railway engine, No. 2500, at about 2:30 AM on June 22, 1971. At the time of the alleged injury, plaintiff was performing the duties of a fireman.

When plaintiff first reported the accident on June 22, 1971, he stated: "Turning around on seat of Engine 2500 struck left knee on emergency valve lever". (p. 133 ll. 10-14). Plaintiff employed his first attorneys about a month after the accident, and a complaint was filed. (p. 135 ll. 10-25). In his answers to defendant's interrogatories plaintiff stated:

> "2. The plaintiff was seated on the front seat of the locomotive cab on the left side. He attempted to turn to the right and the seat did not swivel as it should have. The plaintiff attempted to arise from the seat and his left knee struck an unguarded emergency air brake valve." (Appendix C).

Subsequently and at trial, plaintiff abandoned his claim that he was injured while turning in his seat. (p. 165 l. 9-p. 166 l. 3).

Upon plaintiff's deposition on March 11, 1975, almost four years after the date of the accident, he claimed for the first time that the accident was caused by the force of slack coming in at the same time he was getting up from

the front seat to move to the rear of the engine which caused him to fall against the front seat and then against the bulkhead and the brake valve. (p. 137 l. 14-p. 138 l. 19; p. 18 l. 12-p. 20 l. 13). In that deposition, plaintiff testified concerning this new version of the accident:

> "Q. Have you ever told anyone up to today this version of what happened that night or morning?
> A. No." (p. 138 ll. 22-24).

Plaintiff was allowed to testify to this new version of the accident at trial in spite of defendant's vigorous objections. (p. 18 l. 12-p. 20 l. 13; p. 56 ll. 6-16). Plaintiff testified that he got up to move from the front seat to the rear seat when the force of the slack action coming in caused him to lose his balance and fall. (p. 55 l. 9-p. 56 l. 5; p. 16 ll. 4-7).

Plaintiff also admitted that there was nothing unusual or abnormal in the occurrence of the slack action or the speed of the train:

> "Q. You don't claim that there was anything unusual about the speed of the train on the evening of June 22, 1971, do you?
> A. No.
>
> . . .
>
> The Court: All right. Mr. Eggert, was there also nothing irregular or unusual about the slacking in movement of the train?
>
> The Witness: Your Honor, this is something we deal with, you know, on a daily basis. I really—we don't think too much about that.
>
> The Court: Every time you start up with a string of cars you have a car-by-car reaction as they stretch out?
>
> The Witness: Exactly.
>
> The Court: As you stop the normal reaction of this slack is to run in and you get a progressive bumping that comes up and reaches the engine?

The Witness: Exactly.

The Court: This is something that you expect in your switching operation?

The Witness: Yes." (p. 185 ll. 1-4, 9-p. 186 l. 3: See also p. 137 l. 25-p. 138 l. 2).

Plaintiff also testified that when he attempted to move from the front seat he knew that the engine was slowing down because he could hear the engine throttling down. (p. 54 l. 19-p. 55 l. 8).

During the argument on defendant's motion for a directed verdict, plaintiff's counsel admitted that there was no negligence in the fact that the slack was coming in, since that was a normal occurrence. (p. 224 ll. 8-15). His only claim of negligence was that, if the seat were functioning properly, plaintiff might have simply fallen back into the seat rather than being thrown against the bulkhead, and/or that plaintiff might not even have been sitting in the front seat from which he attempted to move. (p. 222 l. 9-p. 224 l. 20). The court granted defendant's motion on the ground that plaintiff had failed to offer sufficient evidence so as to warrant the submission of the issue of negligence to the jury. (p. 226 ll. 5-23).

Summary of Argument

Plaintiff-appellant's claims of reversible error are without merit in fact or law. Contrary to plaintiff's assertions in his brief and despite the fact that plaintiff changed his version of how the accident occurred some four years after the fact and that there were serious questions regarding the credibility of almost all of plaintiff's testimony, the District Court, in ruling on defendant's motion for a directed verdict, refused to consider any questions concern-

ing plaintiff's credibility. Instead, the trial judge accepted as true plaintiff's new version of the accident with all reasonable inferences therefrom.

What the District Court did determine, as it properly should have, was whether plaintiff's evidence on the issue of defendant's negligence was sufficient to warrant submission of that issue to the jury. The Court properly determined that plaintiff's evidence was insufficient.

The District Court also properly excluded plaintiff's proffer of irrelevant evidence.

POINT I

The District Court properly dismissed plaintiff's case at the close of his proof, because, while accepting plaintiff's version of the facts and giving plaintiff all reasonable and favorable inferences therefrom, plaintiff's proof failed to show that defendants were negligent in causing plaintiff's alleged injuries.

The District Court did not, as claimed by plaintiff in his brief, usurp the basic function of the jury in dismissing plaintiff's cause of action. As a reading of the record shows, the trial judge made no factual determinations adverse to plaintiff's claim. Rather, he accepted as true the convoluted facts presented by plaintiff at trial. (p. 209 l. 5-p. 224 l. 23).

The Court, in the first instance, must determine whether a jury question on the issues of negligence and causation is presented by the proof. In *Scocozza v. Erie Railroad Co.*, 171 F.2d 745, 747 (2d Cir.), cert. den., 337 U.S. 907 (1949), this Court held that, when there is insufficient evidence of

negligence on the part of the defendant railroad, the trial court's direction of a verdict for the defendant was proper. See also *Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969), where the Court stated:

> "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the [motion for a directed verdict] is proper. . . . There must be a conflict in substantial evidence to create a jury question."

In granting a motion for a directed verdict the Court should consider all of the evidence in the light and with all reasonable inferences most favorable to the nonmovant. *Boeing Company v. Shipman, supra*, 411 F.2d at 374. The District Court in the case at bar did just that, as indicated by the argument on the motion in the record at pp. 213-217:

> "The Court: . . . Now, the only thing that is in the case, the only thing that I want you to deal with, is the question of the seat, because here we have a movement that was not in any way unusual, the equipment in the cab, other than the seat, is not in any way unsual, and all that we have to be dealing with is a circumstance that Mr. Eggert got up out of the seat, as for any reason he had a right to do, the jarring was not unexpected, he put his hand back on the back of the seat to hold himself against it when, of course, he could note the slack was running in but he fell back, hitting his buttocks against the back of the seat which, because of the eight or ten inch divergence counter-clockwise, had an effect, he said, of angling him—on his reaction to going back against the seat—angling him off to the left side of the cab and making him hit his knee against the emergency brake valve. Now, that is the totality of what they have in the case . . .
>
> • • •

I am saying the jury can accept that . . .

• • •

He doesn't even say—I don't know if he could—but he doesn't even say that it is really unusual, although he reached out to the back of the seat with his hand, that it would be unusual in this motion that he might be thrown down, and he doesn't even say that is wrong. All he says is wrong is being thrown down, the angle of the seat cocked to the left and threw him to the left against the emergency valve. All he is saying is that there is something wrong with the seat because he could not turn the seat.

• • •

. . .The only question is is there some negligence in the seat itself. If it is not there, it is nowhere.

• • •

I don't know whether his knee would have contacted something, but he is not saying that there is anything unusual with the bumping in which he hangs on to avoid falling. I am sure that he never has said on the stand that he never has fallen in any slack running in situation. I am sure, you know, that from time to time happens and he hasn't said to the contrary, but he falls in this situation against a chair which he says is not operating, which consequently was cocked eight to ten inches clockwise, which had an angularity then which when he fell against it would throw him in a reactive force to the left against the valve. That is his story, if there is anything."

The applicable rule on the existence of a case for a jury in F.E.L.A. cases was set forth in *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500 (1957). There the Court held that the test of a jury case in such actions is simply whether the proofs justify with reason the conclusion that employer negligence played any part in causing the injury for which damages are sought. That rule alone, however, does not require that all F.E.L.A. cases go to the jury regardless of the proof submitted. As this Court

noted in affirming a directed verdict for the defendant in *Scocozza v. Erie R. Co., supra,* 171 F.2d at 746:

> "The railroad is liable in this suit only if it was guilty of negligence which caused the accident. But the plaintiff's were entitled to have that issue submitted to the jury if the evidence, viewed in its light most favorable to them, was sufficient to make a prima facie case. [citations omitted]. This does not mean, however, that the assertion of an interested party is alone sufficient to carry the issue of the railroad's negligence to the jury when it is so opposed to known facts and reasonable inferences drawn from them that members of the jury could not fairly reconcile it with those established facts."

Plaintiff's reliance on *Phillips v. Chesapeake and Ohio Railway Company,* 475 F. 2d 22 (4th Cir. 1973) is misplaced because the District Court in the case at bar did not decide the questions raised by the conflicts in plaintiff's testimony and his apparent lack of credibility, but rather, in deciding the motion the Court accepted as true, the plaintiff's version of the facts as presented at trial. The trial judge steadfastly maintained that, if such questions had to be resolved, the jury must decide them. (p. 209 ll. 15-21; p. 210 l. 4; p. 214 l. 11). The trial judge essentially accepted the facts and inferences outlined in appellant's brief at pp. 9-10 (p. 213 l. 11-p. 223 l. 15). What the Court determined was that, even accepting those facts and inferences, plaintiff failed to prove his claim. (p. 226 ll. 3-23).

Plaintiff erroneously and almost facetiously attempts to characterize the District Court's decision as making factual determinations which properly should be made by the jury. However, plaintiff meticulously avoids specific reference to even one factual determination made by the Court which was adverse to the plaintiff. Instead, plaintiff argues that

the Court's determination that the defective seat did not constitute negligence causing, in whole or in part, plaintiff's injuries could only be determined by the jury.

Plaintiff also argues that the Court factually determined that there was no negligence in the "slack action" and suggests that plaintiff's testimony did not agree with that conclusion. Plaintiff, however, testified:

> "Q. . . . Incidentally, slack, if there was any slack, slack is a normal thing in railroads switching moves?
> A. Yes." (p. 137 ll. to p. 138 l. 2). See also p. 185 ll. 1-4, 9-p. 186 l. 3 quoted *supra*.
>
> "Q. You don't claim that there was anything unusual about the speed of the train on the evening of June 22, 1971, do you?
> A. No." (p. 185 ll. 1-4).

In addition, plaintiff's counsel stated:

> "Mr. Semple: . . . Mr. Eggert, we admit has testified that slack action is a common occurrence on the railroad, there is no question about that. I don't think there is any dispute about that, as Mr. Griffin has said and as the Court has said, the whole thing hangs on this defective seat." (p. 224 ll. 8-15).

Contrary to plaintiff's assertions, the District Court did not usurp the jury's function in deciding the factual issues presented in the case at bar, nor did the District Court deny plaintiff his right to a trial by jury. Instead, the Court determined that, after accepting plaintiff's new version of the facts and after giving plaintiff the benefit of all reasonable and favorable inferences therefrom, plaintiff's evidence of defendant's alleged negligence as a causative factor of plaintiff's alleged injuries was insufficient to warrant submission of that issue to the jury.

POINT II

The District Court, in directing a verdict in favor of defendants, properly determined that plaintiff failed to prove any negligence on the part of defendants which caused plaintiff's alleged injuries.

The test for determining whether a railroad is liable under the F.E.L.A. for an employee's injury is whether there is any negligence on the part of the railroad which played a role in causing the injury. *Mileski v. Long Island Railroad Co.*, 499 F.2d 1169, 1171 (2d Cir. 1974). Liability under the F.E.L.A. is based on negligence having a causal connection with the alleged injury. *Page v. St. Louis Southwestern Railway Co.*, 312 F. 2d 84, 87 (5th Cir. 1963). Although the F.E.L.A. has been construed liberally to allow employees to recover even when the employer's negligence is minimal, the employee must still demonstrate some negligence and proximate cause. *Herdman v. Pennsylvania RR. Co.*, 352 U.S. 518 (1957); *Tiller v. Atlantic Coastline RR. Co.*, 318 U.S. 54 (1943); and *Rodriguez v. Delray Connecting RR.*, 473 F.2d 819, 820 (6th Cir. 1973).

Taking the evidence in the light most favorable to the plaintiff, as the District Court did, it appears that the front seat on the left side of the engine would not swivel and was cocked to the left; that plaintiff sat in the front seat during his workshift on the night in question; that while the engine was slowing down, a fact known to the plaintiff at that time, plaintiff got out of his seat to move to the rear seat; and that, while so doing, the force of the slack action coming in, a normal occurrence in the operation of an engine, knocked the plaintiff off balance causing him to fall against the front seat and then against the bulkhead and the brake valve.

Plaintiff first argues that the jury should have been allowed to determine whether the jolt from the slack action constituted negligence causing plaintiff's alleged injuries. Plaintiff, in making this argument, admits that the sole impetus which caused his fall was the force of the slack action coming in. This argument is without merit. Plaintiff, as quoted *supra*, repeatedly stated that slack action is a normal expected occurrence in railroad operations, and the only reasonable inference that can be drawn from his testimony that he knew the engine was slowing down was that he knew there would be a jolt from the slack action as he was attempting to move from his seat. In *Herdman v. Pennsylvania R.R. Co., supra*, 352 U.S. at 520, the Supreme Court, in affirming a directed verdict for the defendant, held that the jolting caused by sudden, unscheduled stops did not warrant an inference of negligence on the part of the railroad, since such occurrences were not unusual or extraordinary. It was agreed, then, that this normal occurrence known and expected by the plaintiff, was not a basis for an inference of negligence.

Plaintiff's only other contention is that the seat was defective in that it would not swivel and was cocked to the left and that the jury should have been allowed to speculate as to whether the condition of the seat constituted negligence causing plaintiff's alleged injuries. The mere fact that the seat did not swivel had no causal significance to the occurrence of the accident. Plaintiff had been sitting in that seat at all times prior to the accident, even though the engine had been moving back and forth in the yard. Plaintiff simply decided to move to the rear seat so that he could better communicate with Mr. Kendall who was operating the engine. The fact that he claims to have been changing seats because the front seat did not swivel is no

more significant than if he had decided to change seats simply for the sake of changing seats and had tripped over the seat while doing so. At best, *the seat is a mere occasion and not a cause* or a basis for negligence. The seat was not an operative cause of any accident.

Even if it is assumed that plaintiff would not have changed seats "but for" the fact that the seat did not swivel, that is not enough to impose liability on the defendant. First, it must be shown that the failure of the seat to swivel constituted negligence. Plaintiff failed to offer any grounds for such a finding, clearly because there are none. Second, as this Court held in *Nicholson v. Erie RR. Co.*, 253 F.2d 939, 941 (2d Cir. 1958):

> "It is not enough, however, that the injury would not have happened 'but for' the negligence. . . .
>
> . . .
>
> . . . We believe that in the course of this process the cause and effect here were too far removed from one another . . . to satisfy the requirements of the F.E. L.A."

Plaintiff also argues that the jury should have been allowed to speculate as to whether the condition of the front seat constituted negligence on the part of the defendant contributing to the cause of plaintiff's injuries. Plaintiff, however, failed to offer any concrete evidence tending to show that the seat, because its condition—and not simply because it was there, contributed to plaintiff's injuries. The only reasonable inference that may be drawn from the facts is that plaintiff would have bounced off the seat and fallen against the bulkhead and brake valve regardless of the condition of the seat.

Mere peculation is not allowed to replace probative facts. *Tennant v. Peoria and P. U. Ry.*, 321 U.S. 29, 32-33 (1944); *Metcalfe v. Atchison, Topeka and Santa Fe Ry.*, 491 F.2d 892, 896 (10th Cir. 1974). "A mere scintilla of evidence is insufficient to present a question for the jury." *Boeing Co. v. Shipman, supra,* 411 F.2d at 374. In *Albergo v. Reading Co.*, 372 F.2d 83, 85 (3rd 1966), cert. den. 386 U.S. 1036 (1967), the Court succinctly stated the rule applicable to the case at law:

> "The test of a jury case 'is simply whether the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury . . . for which damages are sought'. [citing *Rogers v. Missouri Pacific Railway Co., supra*]. The evidence may be minimal but it must be sufficient 'to provide the jury with some rational basis for concluding that some negligence of the railroad' proximately contributed to the accident. *Dessi v. Pennsylvania R. Co.*, 251 F.2d 149, 150 (3rd Cir. 1958), cert. den. 356 U.S. 967 . . .; *Gill v. Pennsylvania R. Co.*, 201 F.2d 718 (3rd Cir. 1953), cert. den. 346 U.S. 816 . . . The issue of negligence may not be submitted to the jury solely on the basis of conjecture."

Where plaintiff's proofs simply establish that he was injured as a result of an accident, that alone is insufficient to justify submission of the claim to the jury. *Albergo, supra,* at 85. In the instant case, there was a complete failure of proof.

POINT III

The District Court properly refused to allow plaintiff to offer evidence in regard to other types of yard engines and guarded brake valves.

Plaintiff attempted to show that other locomotives had brake valves guarded by a metal bar. Such proof was properly excluded by the Court as irrelevant because the presence or absence of a guard had nothing to do with the occurrence of the alleged injury; and the existence of the guard would not have prevented the injury.

Similarly, the Court properly excluded evidence with regard to whether the engine in question was best suited for the type of work being performed. It has been repeatedly held that a railroad is not an insurer of its employee's safety, and that the F.E.L.A. does not contemplate absolute elimination of all dangers. See for example *Bridger v. Union Railway Co.*, 355 F.2d 382 (6th Cir. 1966). Evidence of the other types of engines used for switching work was irrelevant to the issues raised in the case at bar.

CONCLUSION

The judgment of dismissal below should be affirmed.

Respectfully submitted,

MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE,
Attorneys for Defendants-Appellees,
2300 Two Main Place,
Buffalo, New York 14202.

Buffalo, New York,
March 1, 1976.

Of Counsel,
RICHARD F. GRIFFIN,
DANIEL M. DARRAGH.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: Thomas W. Eggert
v
Norfolk & Western Railway Co.,et ano
Docket No. 75-7675

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 9 day of March, 1976 I mailed 2 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to:

John F. Collins, Esq.
Suite 464
Statler Hilton Hotel
Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Daniel M. Darragh, Esq.
2300 Two Main Place, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this
9 day of March, 1976

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19.77